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the Ten Hour Law.

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DAVID ROSS, Secretary

Constitutional Aspects of The Ten Hour Law

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(SUPPLEMENTAL.)

CONSTITUTIONAL ASPECTS OF THE TEN HOUR LAW ENACTED BY THE FORTY-SIXTH GENERAL ASSEMBLY OF ILLINOIS.

The final agreement upon a legal maximum of ten hours as a day's work for female employés in factories and laundries was the result of careful consideration of what was constitutionally practicable under the decisions of the Supreme Court of the State.

A serious difficulty presented itself by reason of the case of Ritchie v. People decided in 1895, in which the Supreme Court of Illinois, in an opinion remarkable even among Illinois decisions for the strong stand it took in favor of the constitutional right of freedom of contract, declared invalid a law of 1893 providing that no female should be employed in any factory or workshop more than eight hours in any one day or forty-eight hours in any one week.

The arguments which notwithstanding this decision were deemed controlling in favor of the new law, were the following:

1. The actual decision in the Ritchie case was that a case for a legislative limitation of the hours of labor of women to *eight* in the day had not been made out. That this conclusion should have been reached is not surprising. With a rapid change of opinion within the last two decades in favor of restricting the hours of labor of women, an eight hour maximum day for women workers is even now unknown in America or in Europe, and in Germany it took eighteen years, from 1892 to 1910, to reduce the workday of female factory hands by one hour—from eleven to ten hours. It is easy to understand that a compulsory eight hour day in 1893 or 1895 should have appeared to the Court as an unreasonable or even arbitrary interference with private rights. To say the least, the measure was far ahead of the times.

2. Much of the language of the decision in the Ritchie case may be construed as a condemnation of all and any legislative regulation of hours of labor for adult persons. If every word of Judge MAGRUDER'S opinion is approved by the present Supreme Court, a ten hour law may not fare differently from an eight hour law. However, some of the dicta of that opinion express views so absolutely at variance with opinions now almost universally held in this country, that it is reasonably certain that they cannot be taken to represent the permanent doctrine of this State.[1]

[1] Note—Reference is made particularly to the following propositions found in the opinion:

> Labor is property, and the laborer has the same right to sell his labor, and to contract with reference thereto, as has any other property owner.
>
> But the police power of the State can only be permitted to limit or abridge such a fundamental right as the right to make contracts, when the exercise of such power is necessary to promote the health, comfort, welfare or safety of society or the public; and it is questionable whether it can be exercised to prevent injury to the individual engaged in a particular calling. The Court of Appeals of New York, in passing upon the validity of an Act "to improve the public health by prohibiting the manufacture of cigars and preparation of tobacco in any form in tenement houses," etc., has said: "To justify this law it would not be sufficient that the use of tobacco may be injurious to some persons, or that its manufacture may be injurious to those who are engaged in its preparation and manufacture; but it would have to be injurious to the public health."

3. The course of legal development since 1895 has been such as to weaken the authority of the Ritchie case. The progress of legislation shows an unabated public sentiment in favor of regulation. To the eight states which in 1895, outside of Illinois, limited the hours of labor of women, viz.: Massachusetts, Rhode Island, Louisiana, Connecticut, Maine, New Hampshire, Maryland and Virginia, there have since been added Pennsylvania, New York, Nebraska, Washington, New Jersey, Oregon and South Carolina. (See Mr. Brandeis' brief in *Muller* v. *Oregon*). In none of these states, however, has the time of labor for every day in the week been reduced to less than ten.

4. More important than the course of legislation is the course af adjudication. In 1895 only one statute had been passed upon by a Supreme Court —that of Massachusetts—and that had been sutained. Since that time ten hour legal days for women workers (with certain variations in detail as to occupations covered and total of hours for the week) have found judicial approval, by a lower court in Pennsylvania, and by the highest state courts in Nebraska, Washington and Oregon. If in the case of *Ritchie* v. *People*, the Supreme Court stated that the Massachusetts decision was against the current of authority (a statement not at that time correct as to limitation of hours), it is now clear that the current of authority is altogether with it, and that the decision in the Ritchie case would be against the weight of authority were it not for the fact that the law which it condemned was an eight hour and not a ten hour law.

5. Most important of all is the decision of the Supreme Court of the United States sustaining the Oregon statute (*Muller* v. *Oregon*, 208 U. S., 412, 1908)—doubly significant because Illinois copied the provision of the Oregon law in the form in which it had been sustained, omitting the extension it received in 1907.

The provision of the State Constitution upon which the Supreme Court of Illinois relied in the Ritchie case, is the same as that found in the federal Constitution. It is within the power of a state court to interpret its own Constitution independently, and in view of the fact that the Supreme Court of the United States seems in part to place its decision on the Oregon law upon a supposed inferiority of women in the enjoyment of constitutional rights, there may be some temptation to assert for Illinois an independent and different doctrine of personal rights. However, such a course would be unfortunate. The protection of fundamental rights is assumed by the nation on the theory that they are national in character, and the measure of those rights ought to be the same all over the country. The Supreme Court will see to this, if they are unduly impaired by state legislation; it cannot interfere if they are unduly exalted by the State courts; but the principle of unity of interpretation is the same in both cases; it is undesirable that the same words should receive a different construction from a local and a national jurisdiction. This consideration may be expected to have its due weight with the Supreme Court of Illinois.

6. The course of social study and investigation since 1895 has been such as to supply the defect which caused the adverse decision in the Ritchie case, namely, the insufficiency of the reasons for the restraint upon the freedom of contract. The gist of the decision in the Ritchie case, the principle to which the Supreme Court may be expected to adhere, was the right of the adult male or female—to determine his or her hours of employment, *in the absence of a compelling public interest requiring a reasonable modification of that right.* It appears from the opinion in the Ritchie case that no such interest was shown to the satisfaction of the Court. "There is no reasonable ground,—at least none which has been made manifest to us in

the arguments of counsel—for fixing on eight hours in one day as the limit within which woman can work without injury to her physique, and beyond which, if she work, injury will necessarily follow."

The gain in knowledge during the last fifteen years has been such as to induce a legitimate expectation that the reasonableness of the present regulation can be made manifest to the Court. The demands of the public welfare change and rise with a growing knowledge of dangers and of the means of counteracting them. Until the beginning of the nineteenth century there was a widespread if not universal conviction that the industrial employment of children was a benefit to them and to their families, and to an extent this may have been true. (See Hutchins Harrison, History of Factory Legislation, Chap. 1.) The heightened estimation of the value of education, the truer appreciation of the relation of remote to proximate effects, has led to a reversal of the earlier conviction, and the justification of our present child labor laws,—in which Illinois stands second to no other State—is not the unlimited power of the State over the person under age, but the force of the considerations that make the exploitation of child labor appear a danger and a loss to the community.

The point at which the detriment to the public welfare is sufficient to overbear the liberty of the individual, varies according to the physical conditions; an intelligent realization of these conditions is the prerequisite of the exercise of the police power. The significant and controlling factor in the present situation, as applied to the ten hour law and as compared with the situation in 1895, is the fact that the hygienic aspect of long continued hours of female industrial labor, especially of such kind as is characteristic of the occupations named in the act, has been made the subject of thorough study within the last fifteen years. Some material had been collected before 1895, but it is only necessary to compare the very able brief of Messrs. Ela and Bruce on behalf of the People in the Ritchie case with the well-known brief of Mr. Brandeis in the Oregon case to realize how relatively meagre was at that time the information available to the Court.

7. In the closing days of 1907, Germany enacted a law, based upon exhaustive government researches and reports of factory inspectors, which from and after January 1, 1910, will reduce the hours of women workers in factories to ten in the day. The report of the Committee of the Reichstag recommending the passage of the law was by Representative Dr. Pieper. Since it is not uncommonly believed that German legislation can furnish no standard of what is proper under our constitutions, it may be permitted to quote the following words written by Dr. Pieper, which bear upon the present situation.

"It is to be considered in connection with the legal limitation of hours of labor, that compulsion can be exercised only in so far as urgent grounds of the public welfare demand such interference. Hence all such measures are in the nature of a protection of the laborer against material injury to his bodily or moral well-being; within measurable time it will be impossible, at least as far as private business is concerned, to call for legislation for the purpose of reducing hours of labor with a view to securing, beyond the protection of the mere safe conditions of existence, a higher standard of comfort. To accomplish this, workmen must resort to their own efforts." (Schriften d. Gesellschaft f. soziale Reform, No. 758, p. 3.)

These words express perfectly the principle emphasized by the Supreme Court of Illinois, yet they were used in advocating a ten hour law for women workers in the factories.

The present law does not call for a reversal of the principles on which the decision of 1895 was based, but for an application of those principles, in the light of new information and of a better understanding of relevant conditions, to a regulation different in extent and effect from the one previously condemned.

NOTE.

The following are the amendments of the German Trade Code, adopted in December, 1908, which bear on the reduction of hours of labor of female employés:

Provisions for workshops in which as a rule at least ten workmen are employed.

§ 137a. Workingwomen may not be employed in the night time from eight o'colck in the evening to six o'colck in the morning, and on Saturdays and the eve of holidays not after five o'clock in the afternoon.

The employment of workingwomen may not exceed the duration of ten hours daily, and of eight hours on the eve of Sundays and holidays.

Between working hours at least one hour of noon rest must be allowed to working women.

After the end of the daily working time a continuous rest of at least eleven hours must be allowed to working women.

Working women who have to attend to a household, must at their request be dismissed half an hour before the noonday rest, unless this lasts at least one hour and a half.

Working women may not be employed before or after confinement, altogether for eight weeks. Their return to labor requires proof that at least six weeks have elapsed since their confinement.

Working women may not be employed in coke works, nor in transporting building material.

§ 138a. On account of extraordinary pressure of work the inferior administrative authority may, on application of the employer, permit the employment for the space of two weeks, of working women of the age of sixteen years and upward, until nine o'clock in the evening except on Saturdays, provided that the daily worktime does not exceed twelve hours, and the continuous period of rest does not fall below ten hours. Within one calendar year the permission may not be granted to an employer for his establishment or for a department of his establishment for more than forty days.

For a period exceeding two weeks, the same permission may be granted only by the higher administrative authority, and for more than forty and not to exceed fifty days in the year only if the worktime for the establishment or the department of the establishment is so arranged that the average daily time of work for all working days in the year does not exceed the legal time of work.

§ 139a. The federal council is authorized * * *

4. To grant exemptions from the requirements of § 137, 1, 2 and 4, in case of seasonal trades, for not more than forty days in the calendar year, provided that the daily time of work deos not exceed twelve hours, or eight hours on Saturdays, and that the period of continuous rest does not fall below ten hours. The hours of the period of continuous rest must be in the period between ten o'clock in the evening and five o'clock in the morning.

5. To grant exemptions from the requirements of § 137, 1-4, for trades in which night work is urgently necessary to prevent the spoiling of raw material or the failure of the product, provided that the period of continuous rest may be reduced to not less than eight hours and a half on not more than sixty days in the calendar year.

In the cases under 4 the permission of excess work may be granted for more than forty, but not to exceed fifty days, only if the work time is arranged so that the average time of work for the work days of the year does not exceed the regular legal maximum time of work.

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